1753. *February* 2. Gavin More of Shawhead, Supplicant.

No. 133.
A summary application for recording an entail is not competent at the instance of a substitute.

A substitute in an entail presented a petition to the Court, with the deed of entail, craving the authority of the Court for recording the same in the register of tailzies.

"The Lords were unanimous that this demand was not competent by a summary application; that when a substitute makes such an application, it must be by a process, in which the heir in possession must be made a party, and in which he may have an opportunity to make his objections against recording; this in particular, that if the maker of an entail chooses not to record the same himself, nor lays his heirs under an obligation to record it by a clause in the deed, no substitute is entitled to demand the same to be recorded." See No. 135. p. 15605.

*Sel. Dec. No.* 36. *p.* 41.

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1753. *February* 9.

James Hay, Clerk to the Signet, *against* His Majesty's Advocate.

No. 134.
An estate found to be carried by forfeiture from the whole substitutes of an entail, where the tailzie was not recorded, and contained no clause irritating the contravener's right, or prohibiting to sell.

Mr. Adam Hay, in the year 1726, executed an entail of his lands of Asleid, and others, in favour of Adam Hay, his grandson by his eldest son Andrew Hay, then deceased, and the heirs-male of the said Adam's body; whom failing, to James Hay, the tailzier's second son, and the heirs-male of his body, under most of the usual prohibitory clauses, and a clause irritating the debts. But the tailzie neither contains any clause irritating the contravener's right, nor a prohibition from selling.

Further, the tailzie was not recorded as directed by the act 1685; but a charter was expede upon it, on which no infeftment followed.

Adam Hay, upon the death of his grandfather, in the year 1727, attained possession of the tailzied lands; and, having joined in the Rebellion in the year 1745, he was attainted of high treason, and the lands were surveyed, by order of the Barons of Exchequer, in terms of the statute of the 20th of the King.

James Hay, the tailzier's second son, entered a claim to the Court of Session, as directed by the said statute, praying the Court to find, "That only an estate for life of the said Adam Hay was forfeited to his Majesty by the said attainder; and that, upon the death of the said Adam Hay, the lands of Asleid, and others, will belong to the claimant."

His Majesty's Advocate objected to the claim, 1*st*, That the tailzie was not recorded in terms of the act 1685, and therefore can have no effect against the Crown, or against any third parties.

2*dly*, That there is neither any provision in the entail for irritating the contravener's right in case of transgressing the prohibitions; nor any clause prohibiting to alien.

It was pleaded for the claimant, That this claim must be determined by the rules of the English, and not of the Scots law; for, by act 7th Anne, Cap. 21, the treason-laws of Scotland were repealed, and the treason-laws of England substituted in their place; and, from the late judgment of the House of Lords, in the case of Gordon of Park, No. 60. p. 4728. it appears, that with respect to forfeiture, entails in Scotland are to be considered as estates tail in England, to the constituting of which recording is not necessary; and as, by the law of England, the tenant in tail cannot forfeit the right of the remainder-man, because no more is in the tenant in tail but an estate for himself and his issue; so, from analogy, the heir of entail in possession, cannot forfeit the right of a substitute, as was decided in the said case of Park; and with great justice, for the substitute in an entail has a much stronger interest in the estate by the law of Scotland, than a remainder-man has by the law of England; the right of the latter may lawfully be defeated by fine and recovery, but the former cannot; and even though the entail be not recorded, and therefore a creditor and purchaser contracting *bona fide* with the heir in possession would be safe; yet there would lie an action at the instance of the substitute or remoter heir against the heir in possession, to disburden the lands of all deeds done contrary to the entail, or to repair the damage thereby done to the remoter heir. By the law of Scotland before the act 7th Anne, the heir in possession could not forfeit to the prejudice even of his own issue, because he could not alienate from them; and seeing our entails are now put on a footing with estates tail in England, in so far as is prejudicial to the subject, they must also be on the same footing in so far as beneficial, and therefore must be effectual against the Crown, though not recorded. No. 134.

What has been already pleaded, may also serve to obviate the other objection to the claim, viz. that the tailzie contains no clause irritating the contravener's right, not prohibiting to sell the lands; for, by the law of England, no such clauses are requisite to the constitution of an estate tail, and the tenant in tail has a power of selling by fine and recovery.

But this claim would be good, though it were to be judged by the law of Scotland; for as the tailzie remained a personal deed, and no infeftment ever taken on it, the right was limited by common law, by all the qualities and provisions contained in the grant, independent of the statute 1685, and therefore good against creditors; as was found by the House of Lords, in the case of the heir of tailzie and the Creditors of Sir Robert Denholm of Westshiels, No. 113. p. 15557; and consequently would be good against a forfeiture.

And though the tailzie contains no clause irritating the contravener's right, it is by no means a settled point, that therefore it would not be good against creditors; for though it has been so found by this Court, yet the decree was varied by the House of Lords, in the case of Riccarton, No. 81. p. 15494. and has not been decided by this Court since that time; and whatever may be found in the case of onerous creditors, from the favour which is due to them; yet it ought not to be

No. 134. extended to forfeitures. *Lastly*, A power of selling will not infer that the estate may be carried away si heres delinquendo contraxerit.

It was answered for his Majesty's Advocate, That the pains and penalties for high treason must be regulated by the law of England; but when that law comes to be applied to the case of a Scots estate, the nature of such estate can only be known from the law of Scotland. And therefore, when the question is, Whether or not an estate in Scotland be settled by a proper entail, such as, from analogy, ought to save the right of the substitutes, as the right of remainder-men are saved? that question can only be determined by the law of Scotland. By the statute of Westminster 2. it was provided, Quod voluntas donatoris, secundum formam in carta doni sui, manifeste expressam observetur. But, with us, a settlement, though containing ever so many substitutions, is held to be no more than a simple destination alterable at pleasure, unless the substitutions are fenced with prohibitory and irritant clauses. And therefore, before one can plead before this Court, that the right competent to remainder-men by the law of England ought to be extended to him, he must show that he claims under an entail properly constituted according to the law of Scotland; to the constituting of which, it is necessary that the entail be recorded; and though there would lie an action of damages against the heir in possession, who counteracted the tailzie, yet that is no argument against the forfeiture; for an heir of provision, by a contract of marriage, would have such an action against his father, and yet the estate would forfeit by the father's attainder.

It will not avail the claimant in this case, that the entail remained personal; for Adam Hay, the forfeiting person, was apparent heir to his grandfather in the lands, and possessed in his right of apparency, without regard to the entail; and consequently his debts and deeds must affect the lands, notwithstanding the limitations contained in the entail, which remained a latent deed, and was never acknowleged by the apparent heir as the title of his possession.

Such being the case, there is no need for insisting on the other objection to the claim, viz. That the tailzie contains no clause irritating the contravener's right, nor prohibiting to alienate: only on this head it may be observed, that it has always been held as the law of Scotland, that a prohibition to contract debt, without a clause irritating the contravener's right, is not effectual, because the law does not permit that a man should retain the property of lands, and transmit them to his heirs, without their being subject to the lawful debts by him contracted: And so it was judged by this Court, 11th Mareh, 1707, Heiress of Redheugh against Forsyth, No. 80. p. 15489; and 26th July, 1712, Creditors of Riccarton competing, No. 81. p. 15494. And where the heir is not laid under a restraint from selling, it is impossible to maintain, that the estate cannot forfeit by his attainder.

"The Lords dismissed the claim."

Act, *Ro. Craigie & Ferguson.* Alt. *Advocatus Sol. Haldane & And. Pringle.*
Clerk, *Gibson.*

*B.* *Fac. Coll. No.* 63. *p.* 96.